106

No. 08-283

SEP 23 2008

IN THE

Supreme Court of the United States

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE,

Petitioner,

v.

CATERPILLAR INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 23, 2008

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QUESTIONS PRESENTED

Caterpillar Inc. ("Caterpillar") does not believe it is appropriate for it to try to restate any of the Questions Presented set forth by Trans-Spec Truck Service, Inc. ("Trans-Spec") in its Petition. There are no questions appropriate for review on certiorari presented by the decisions below.

RULE 29.6 STATEMENT

Caterpillar is a publicly held corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS ENTERED IN THE CASE 1

JURISDICTION 1

PROVISIONS INVOLVED IN THE CASE 1

Fed. R. Civ. P. 16(b)(1), (3) and (4) 1

Rule 16.1 of the Local rules for the United States District Court for the District of Massachusetts 2

STATEMENT OF THE CASE 3

ARGUMENT 9

I. Federal law, including the law from this Court and from the several circuits, is clear, unanimous, and well-settled that a complaint is appropriately dismissed under Fed. R. Civ. P. 12(b)(6) when the averments of the complaint, accepted as true, affirmatively show the claim is barred by the applicable statute of limitations. That is what occurred here. Trans-Spec waived any ar-

gument that the district court abused its discretion in refusing to consider materials extrinsic to the second amended complaint in opposition to the motion to dismiss and, in any event, there was no abuse of discretion. Trans-Spec's assertion that it could not anticipate the statute of limitations issue is based on misrepresentation of the record, the statute of limitations having been raised as an affirmative defense to the first amended complaint months before Trans-Spec filed the second amended complaint which was dismissed. 9

II. Federal law is clear, unanimous, and well-settled that, after the deadline for amendments to the pleadings established by a Fed. R. Civ. P. 16(b) scheduling order has expired, a plaintiff wishing to amend its complaint must first show good cause for revising the scheduling order, including a showing that the proposed amendment could not with reasonable diligence have been made before the deadline was reached. The cases Trans-Spec cites for the contrary position were either decided before the governing language of Rule 16(b) was enacted in 1983 or did not involve cases in which the Rule

16(b) deadline had expired. There was no abuse of discretion in denying Trans-Spec's late motion to amend because Trans-Spec showed no good cause for its untimeliness. 16

CONCLUSION 23

APPENDIX

Portions of Civil Docket for Case #1:04-cv-11836-RCL 1a

TABLE OF AUTHORITIES

FEDERAL CASES:

Abdul-Akbar v. McKelvie,
239 F.3d 307 (3rd Cir.), *cert. denied*,
533 U.S. 953 (2001) 15

Associated General Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519 (1983) 13

Baylor Univ. Medical Center v. Epoch Group, L.C.,
2005 WL 2124126 (N.D. Tex. 2005) 18

Bethel v. Jendoco Const. Corp.,
570 F.2d 1168 (3rd Cir. 1978) 11

Buckey v. County of Los Angeles,
968 F.2d 791 (9th Cir. 1992) 20

Buel v. City and County of San Francisco,
166 Fed. Appx. 901, 2006 WL 26195
(9th Cir. 2006) 18

Cavallo v. Star Enterprise,
100 F.3d 1150 (4th Cir. 1996), *cert. denied*,
522 U.S. 1044 (1998) 15

Cortec Industries, Inc. v. Sum Holding, L.P.,
949 F.2d 42 (2nd Cir. 1992) 20

Dorsey v. Northern Life Ins. Co.,
2005 WL 2036738 (E.D. La. 2005) 18-19

Eastern Minerals & Chems. Co. v. Mahan,
225 F.3d 330 (3rd Cir. 2000) 17

Foman v. Davis,
371 U.S. 178 (1962) 20

Golden Pacific Bancorp v. Clarke,
837 F.2d 509 (D.C. Cir.), *cert. denied*,
488 U.S. 890 (1988) 14-15

Gossard v. Gossard,
149 F.2d 111 (10th Cir. 1945) 11, 12

Gwyn v. Loon Mountain Corp.,
2002 WL 1012929 (D. N.H. 2002),
aff'd., 350 F.3d 212 (1st Cir. 2003) 19

Harris v. City of New York,
186 F.3d 243 (2nd Cir. 1999) 11

Herron v. Herron,
255 F.2d 589 (5th Cir. 1958) 11

Hoover v. Langston Equipment Assocs., Inc.,
958 F.2d 742 (6th Cir. 1992) 11, 12

In re Milk Products Antitrust Lit.,
195 F.3d 430 (8th Cir. 1999), *cert. denied*,
529 U.S. 1038 (2000) 18

Inge v. Rock Financial Corp.,
281 F.3d 613 (6th Cir. 2002) 18

Johnson v. Mammoth Recreations, Inc.,
975 F.2d 604 (9th Cir. 1992) 17

Jones v. Bock,
549 U.S. 199, 127 S.Ct. 910 (2007) 10

Kassner v. 2nd Avenue Delicatessen Inc.,
496 F.3d 229 (2nd Cir. 2007) 18

Kinchloe v. Farmer,
214 F.2d 604 (7th Cir. 1954), *cert. denied*,
348 U.S. 920 (1955) 11, 12

KMS Restaurant Corp. v. Wendy's International, Inc., 361 F.3d 1321 (11th Cir. 2004) 15

LaChapelle v. Berkshire Life Ins. Co.,
142 F.3d 507 (1st Cir. 1998) 11

Leary v. Daeschner,
349 F.3d 888 (6th Cir. 2003) 17

Love v. Ford Motor Co.,
212 Fed. Appx. 292, 2006 WL 3826991
(5th Cir. 2006) 18

Miller v. Bd. of Educ. of Albuquerque Public Schools, 455 F.Supp.2d 1286
(D. N.M. 2006) 17

Minter v. Prime Equipment Co.,
451 F.3d 1186 (10th Cir. 2006) 17

Montgomery v. Anne Arundel County, Maryland,
182 Fed. Appx. 156, 2006 WL 1194308
(4th Cir. 2006) 17

O'Connell v. Hyatt Hotels,
357 F.3d 152 (1st Cir. 2004) 17

O'Hara v. Weeks Marine, Inc.,
294 F.3d 55 (2nd Cir. 2002) 15

Oliver Schools v. Foley,
930 F.2d 248 (2nd Cir. 1992) 20

Oravec v. Sunny Isles Luxury Ventures, L.C.,
527 F.3d 1218 (11th Cir. 2008) 17

Parker v. Columbia Pictures Indus.,
204 F.3d 326 (2nd Cir. 2000) 17

Pignons S.A. de Mecanique v. Polaroid Corp.,
701 F.2d 1 (1st Cir. 1983) 15

Preservation Coalition, Inc. v. Pierce,
667 F.2d 851 (9th Cir. 1982) 15

Rowen v. New Mexico,
210 F.R.D. 250 (D. N.M. 2002) 17

S&W Enters. v. South Trust Bank of Ala.,
315 F.3d 533 (5th Cir. 2003) 17

Shane v. Bunzl Distribution USA, Inc.,
275 Fed. Appx. 535, 2008 WL 1896589
(6th Cir. 2008) 18

Sherman v. Winco Fireworks, Inc.,
532 F.3d 709 (8th Cir. 2008) 17

SIL-FLO, Inc. v. SFHC, Inc.,
917 F.2d 1507 (10th Cir. 1990) 17

Silverton Snowmobile Club v. U.S. Forest Service,
433 F.3d 772 (10th Cir. 2006) 15

Sosa v. Airprint Sys., Inc.,
133 F.3d 1417 (11th Cir. 1998) 17

Tregenza v. Great American Communications Co., 12 F.3d 717 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994) 11

Trustmark Ins. Co. v. General & Cologne Life Re of America, 424 F.3d 542 (7th Cir. 2005) 17

Tufaro v. Board of Comm'rs. for Orleans Levee Dist., 2003 WL 22290290 (E.D. La. 2003) 19

Vercon Const. Inc. v. Highland Mortg. Co., 187 Fed. Appx. 264, 2006 WL 1747115 (4th Cir. 2006) 17

Williams v. Astra USA, Inc., 68 F.Supp.2d 29 (D. Mass. 1999) 20

STATE CASES:

Burnham v. Mark IV Homes, Inc., 387 Mass. 575, 441 N.E.2d 1027 (1987) 4

STATUTES AND RULES:

15 U.S.C. §2391 *et seq.* 4

Fed. R. Civ. P. 1 19
Fed. R. Civ. P. 11 22
Fed. R. Civ. P. 12(b)(6) ..... *passim*
Fed. R. Civ. P. 15 ..... 20, 23
Fed. R. Civ. P. 16 ..... *passim*

Mass. Gen. Laws c. 93A 4, 6, 7
Mass. Gen. Laws c. 93A, §2 4
Mass. Gen. Laws c. 106, §2-313 4
Mass. Gen. Laws c. 106, §2-314 4
Mass. Gen. Laws c. 106, §2-315 4
Mass. Gen. Laws c. 106, §2-725 12

Rule 16.1 of the Local Rules of the United States District Court for the District of Massachusetts 2-3, 5

Supreme Court Rule 10 ..... 18, 19, 21
Supreme Court Rule 15 3

OPINIONS AND ORDERS ENTERED IN THE CASE

Trans-Spec's citation of the opinions and orders entered below is incomplete because it omits the district court's original Fed R. Civ. P. 16(b) scheduling order and the later orders amending it, the district judge's order adopting the magistrate-judge's recommendations with respect to the motion to dismiss and the motion to strike, and the district judge's order overruling Trans-Spec's motion for reconsideration of the magistrate-judge's denial of its motion to amend the second amended complaint or to alter or amend judgment and adopting her rulings on those subjects. Those orders, all of which are unreported, were entered on the docket but were not memorialized in separate documents. They are set forth in the Appendix to this Brief, *infra* at 1a to 3a.

JURISDICTION

Caterpillar is satisfied with Trans-Spec's jurisdictional statement.

PROVISIONS INVOLVED IN THE CASE

Trans-Spec's recitation of the relevant procedural rules is materially incomplete. The relevant provisions of Fed. R. Civ. P. 16, which is controlling with respect to Trans-Spec's Question II, are:

> (b) Scheduling
>
> (1) *Scheduling Order.* Except in categories of actions exempted by local

> rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order ...
>
> *****
>
> (3) *Contents of the Order.*
>
> (A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
>
> *****
>
> (4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

Rule 16.1 of the Local Rules for the United States District Court for the District of Massachusetts, also relevant to Question II, provides in pertinent part:

> (F) *Scheduling Orders.* Following the [scheduling] conference, the judge shall enter a scheduling order that will govern the pretrial phase of the case. Unless the judge determines otherwise, the scheduling order shall include specific deadlines or general time frameworks for:
>
> (1) amendments to the pleadings;
>
> *****

(G) *Modification of Scheduling Order.* The scheduling order shall specify that its provisions, including any deadlines, having been established with the participation of all parties, can be modified only by order of the judge, or the magistrate judge if so authorized by the judge, and only upon a showing of good cause supported by affidavits, other evidentiary materials, or references to pertinent portions of the record.

STATEMENT OF THE CASE

Caterpillar does not believe any of Trans-Spec's "Questions Presented" merit review. Caterpillar has nonetheless addressed in this section and in its argument the proceedings below that are relevant to Trans-Spec's first two questions. Those two at least involve federal law and, equally important, Trans-Spec's arguments with respect to them are based in part on material misrepresentations of the record which Caterpillar believes Supreme Court Rule 15.2. requires it to call to the Court's attention. Trans-Spec's Question III on its face concerns only Massachusetts state law; its Question IV, though phrased to suggest it involves federal law, appears on review of Trans-Spec's related argument, Petition at 30-32, likewise to involve only state law. Caterpillar therefore does not think discussion related to Questions III and IV is necessary in this Brief except to say there was no error on those subjects below.

Trans-Spec filed its original three-count complaint on August 23, 2004. App. I: 4-5.[1] Count I alleged breach of an express warranty given pursuant to Mass. Gen. Laws c. 106, §2-313 and implied warranties of merchantability and fitness for a particular purpose created by Mass. Gen. Laws c. 106, §§2-314 and 2-315;[2] it also alleged violation of the Magnusson-Moss Warranty Act, 15 U.S.C. §2391 *et seq.*[3] Count II alleged violation of Mass. Gen. Laws c. 93A by virtue of the alleged breaches of warranty described in Count I.[4] Count III sought a preliminary injunction. App. I: 24-31. Exhibit C to the original complaint, App. I: 53-57, was entitled On-Highway Vehicle Extended Service Coverage. The original complaint identified Exhibit C as the express warranty referenced in Count I. App. I: 26, ¶22. Trans-Spec amended the complaint as of right a few days after filing it to correct a spelling error. App. I: 5 (#3). As pertinent here, the original and first amended complaints averred that Trans-Spec purchased 22 custom-built trucks from the non-party Sterling Truck Corporation for use in its business;

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[1] Cites in this form are to the record appendix filed in the court of appeals.

[2] Mass. Gen. Laws c. 106 is Massachusetts' version of the Uniform Commercial Code.

[3] Dismissal of the Magnusson-Moss claim was not opposed or appealed by Trans-Spec and is not raised as an issue in the Petition.

[4] Mass. Gen. Laws c. 93A is Massachusetts' consumer protection act. A regulation promulgated by the Massachusetts attorney-general pursuant to authority granted by Mass. Gen. Laws c. 93A, §2, provides that a breach of warranty in and of itself can constitute a violation of Chapter 93A. *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 581, 441 N.E.2d 1027, 1031 (1987).

the trucks were equipped with Caterpillar C-12 engines; Trans-Spec took delivery in December, 1999, and January, 2000; and beginning in 2001 Trans-Spec experienced problems with flywheel housings on many of the engines. Caterpillar answered the first amended complaint on September 20, 2004, including in its answer *inter alia* an affirmative defense asserting that the claims were barred by the applicable statutes of limitation. App. I: 5 (#15) and 125.

The district judge convened a scheduling conference pursuant to Fed. R. Civ. P. 16(b) and Local Rule 16.1 on October 27, 2004. His scheduling order entered the next day established, among other things, a March 23, 2005, deadline for motions to amend the pleadings. *Infra* at 1a; App. I: 6. On March 31, 2005, Trans-Spec moved for leave to amend its complaint a second time. App. I: 7 (#36). Counts I and II of the proposed second amended complaint, App. II: 190-196, were materially identical to the same counts in the first amended complaint. The original claim for a preliminary injunction was deleted and a new Count III alleged negligence. App. II: 196. Caterpillar opposed the motion for the reason, among others, that it was untimely under the scheduling order and no good cause for relief from the order had been shown, App. II: 137-143, but the magistrate-judge granted the motion because it was only eight days late. App. II: 185. On May 20, 2005, the parties jointly moved to amend the scheduling order in various respects, not including the deadline for amendments to the pleadings, and their motion was allowed. App. I: 9 and App. II: 179-180; *infra* at 1a-2a.

Trans-Spec filed its second amended complaint on May 24, 2005. App. I: 9 (#50) and App: II: 190-221. On May 26, 2005, Caterpillar moved to dismiss it in

its entirety pursuant to Fed. R. Civ. P. 12(b)(6). App. I: 9 (#53) and App. II: 222-224. Trans-Spec opposed the motion and attached voluminous extrinsic materials to its opposition. App. II: 234-301. Caterpillar moved to strike them. App. III: 302-304. The magistrate-judge heard the motion to dismiss and the motion to strike on August 10, 2005. App. I: 11. On August 12, 2005, Trans-Spec moved with Caterpillar's assent to amend the scheduling order again in various respects, not including the deadline for amendment of the pleadings, and the motion was allowed shortly thereafter. App. I: 11 and App. III: 382-383; *infra* at 2a. On October 7, 2005, Trans-Spec moved again to amend the scheduling order, again without opposition from Caterpillar and again without seeking to re-open the deadline for amendment of the pleadings. App. I: 12 and App. III: 384-385. The judge granted the motion in part on October 26, 2005, admonishing, "The court will grant no further requests for amendments to the scheduling order." *Infra* at 2a-3a; App. I: 12.

On January 31, 2006, the magistrate-judge recommended the motion to dismiss be granted with respect to the breach of express and implied warranty, Magnusson-Moss, and Chapter 93A claims but denied with respect to the negligence claim. Petition at 63a-77a.[5] Her recommendation with respect to the breach of express and implied warranty and Chapter 93A claims was based on expiration of the applicable four-year statutes of limitation.[6] Petition at 64a to

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[5] References to the opinions below contained in the appendices to Trans-Spec's Petition are in this form.

[6] Trans-Spec misrepresents the record when, at page 8 of its Petition, it says, "The Magistrate Judge failed to recognize that Trans-Spec's Chapter 93A claim included matters other than Caterpillar's breach of warranty, and recommended dismissing

72a. She recommended Caterpillar's motion to strike be allowed insofar as it sought to strike the extrinsic materials Trans-Spec submitted but denied insofar as it sought to strike pages of Trans-Spec's brief where those materials were referenced. References to them, she said, should be disregarded, as she had done. Petition at 74a-76a. Trans-Spec objected to the recommendation, attaching voluminous extrinsic materials to its objection. App. III: 402-479. Caterpillar moved to strike them. App. III: 480-482. On February 23, 2006, the district judge adopted the recommendation insofar as it pertained to Caterpillar's motion to dismiss and ruled the motions to strike were moot because neither he nor the magistrate-judge had relied on the extrinsic materials. *Infra* at 3a; App. I: 15 Caterpillar answered the negligence count on February 24, 2006. App. I: 15 (#99) and App. III: 483-491. Trans-Spec moved on March 1, 2006, for leave to amend its second amended complaint and to alter or amend the February 23 order. App. I: 15 (#100) and App. IV: 492-568.

March 17, 2006, was the deadline for dispositive motions. App. I: 12. Caterpillar moved that day for

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it on the same statute of limitations grounds." Trans-Spec affirmatively stated in its opposition to Caterpillar's motion to dismiss, "The accrual date of a Chapter 93A claim is established by the same principles that govern the determination of the underlying actions. Therefore, the Chapter 93A claim accrued at the same time as the breach of warranty claims. *Hanson Housing Authority v. Dryvit System, Inc.*, 29 Mass. App. Ct. 440, 448 (1990)." App. II: 239 n. 3. Nowhere in its opposition did Trans-Spec suggest, contrary to that explicit statement or the language of the second amended complaint, that its claim under Chapter 93A was based on anything other than the alleged breaches of UCC warranties. *See* App. II: 234-247. Trans-Spec therefore waived any argument to that effect.

summary judgment on the remaining negligence claim. App. I: 15 (#102) and App. IV: 576-580. Its summary judgment motion and Trans-Spec's motion to amend its complaint again and to alter or amend the dismissal order were heard together on May 31, 2006. App. I: 18. On June 9, 2006, the magistrate-judge denied the motions to amend and to alter or amend the dismissal order but deferred ruling on the summary judgment motion. Petition 51a-56a; App. I: 20 and VI: 910-914. Trans-Spec moved under Fed. R. Civ. P. 72(a) for reconsideration of her order denying its motion. App. I: 20 (#136). On December 1, 2006, the magistrate-judge recommended allowance of Caterpillar's motion for summary judgment. Petition at 33a-49a. Trans-Spec objected. App. I: 21 (#141). On January 2, 2007, the judge affirmed the order denying Trans-Spec's motion to amend its complaint again and to alter or amend the dismissal order. *Infra* at 3a; App. I: 21. On February 13, 2007, he granted summary judgment for the reasons stated in the magistrate-judge's report and recommendation. App. I: 22; Petition at 31a.

ARGUMENT

I. **Federal law, including the law from this Court and from the several circuits, is clear, unanimous, and well-settled that a complaint is appropriately dismissed under Fed. R. Civ. P. 12(b)(6) when the averments of the complaint, accepted as true, affirmatively show the claim is barred by the applicable statute of limitations. That is what occurred here. Trans-Spec waived any argument that the district court abused its discretion in refusing to consider materials extrinsic to the second amended complaint in opposition to the motion to dismiss and, in any event, there was no abuse of discretion. Trans-Spec's assertion that it could not anticipate the statute of limitations issue is based on misrepresentation of the record, the statute of limitations having been raised as an affirmative defense to the first amended complaint months before Trans-Spec filed the second amended complaint which was dismissed.**

Before turning to the law pertinent to Trans-Spec's Question I, Caterpillar is constrained to correct an inaccuracy in Trans-Spec's account of proceedings below. Trans-Spec repeatedly says, Petition at 11-13, that it did not and could not "anticipate" Caterpillar's affirmative defense based on the statutes of limitation; it suggests, Petition at 11, that Caterpillar first raised the statutes of limitation in its motion to dismiss; and it fails to mention that the pleading that was dismissed was its *second* amended complaint, not its original complaint. The truth, unmentioned by Trans-Spec in its Petition, is that Caterpillar explicitly raised the sta-

tute of limitation defense in its answer to the *first* amended complaint filed on September 20, 2004, App. I: 5 (#15) and 125, more than six months before Trans-Spec sought and obtained leave to file its *second* amended complaint. App. I: 7 (#36). Trans-Spec knew of the statute of limitation defense when it drafted and filed its second amended complaint and had ample opportunity and incentive to correct the deficiencies in it that were material to the timeliness issue. There was no "failure to anticipate" the statute of limitation problem; there was just a failure to cure it.

Caterpillar will now turn to the pertinent law, as to which there is no dissension among the federal courts and which makes clear that the courts below in this action got it right. There is absolutely nothing wrong in dismissing a complaint under Rule 12(b)(6) on statute of limitations grounds if the averments of the complaint, accepted as true, show it is time-barred.

This Court said in *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 920-921 (2007):

> A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative defense, see Fed. R. Civ. Proc. 8(c). Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the

> allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract.

The courts of appeals have long recognized the same rule. *See, e.g., LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 509 (1st Cir. 1998); *Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168, 1174 (3rd Cir. 1978); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958); *Hoover v. Langston Equipment Assocs., Inc.*, 958 F.2d 742, 745 (6th Cir. 1992); *Kinchloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954), *cert. denied*, 348 U.S. 920 (1955); *Gossard v. Gossard*, 149 F.2d 111, 113 (10th Cir. 1945). Indeed, the cases cited by Trans-Spec itself recognize and apply it. Judge Posner said in *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), after observing that a plaintiff is not ordinarily required to negate in his complaint a statute of limitations defense: "Of course if he pleads facts that show his suit is time-barred or otherwise without merit, he has pleaded himself out of court." 12 F.3d at 718. And later, "A complaint that on its face reveals that the plaintiff's claim is barred by a statute of limitations or repose can be dismissed on a motion to dismiss, in accordance with the principle noted above that a plaintiff can plead himself out of court." *Id.* at 719. *Harris v. City of New York*, 186 F.3d 243 (2nd Cir. 1999), states the same rule, 186 F.3d at 250, and affirmed the district court's Rule 12(b)(6) dismissal on statute of limitations grounds of several of that plaintiff's claims. *Id.* at 248-249.

This would have been a procedurally different case if, for example, Trans-Spec had omitted from its second amended complaint the dates on which the allegedly defective engines were delivered. If deli-

very dates had not appeared on the face of the second amended complaint it would not have been discernible from that pleading when the four-year statutes of limitation began to run and, hence, the claims would not have been dismissible under Rule 12(b)(6). They would in that circumstance have had to await a summary judgment motion or trial. But Trans-Spec *did* include those dates in the second amended complaint; it also appended as an exhibit to the second amended complaint the specific express warranty it claimed had been breached, so that it was also discernible from the face of the pleading that the warranty was not one of future performance and hence that the dates of delivery were indeed, Mass. Gen. Laws c. 106, §2-725, the dates when the four-year statutes began to run.[7] So Trans-Spec, to use Judge Posner's words, pleaded itself out of court. To use the language of an earlier Seventh Circuit decision, "Plaintiff by the allegations of his complaint erected the limitation bar and it was his duty in order to extricate himself therefrom to plead any exceptions upon which he relied." *Kinchloe*, 214 F.2d at 605. Or, as the court of appeals for the Sixth Circuit put it, "[I]t is not true, when the face of the complaint affirmatively indicates that the time limit for bringing the claim has passed, that plaintiff may escape the statute by saying nothing." *Hoover*, 958 F.2d at 745. *See also Gossard*, 149 F.2d at 113 ("No facts are alleged excusing or explaining the long de-

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[7] Mass. Gen. Laws c. 106, §2-725, specifically excludes any "discovery rule" when the warranty is not one of the future performance of the goods. Typically, actions governed by a statute of limitations that, unlike §2-725, incorporates a "discovery rule" are less susceptible to dismissal under Rule 12(b)(6) or, for that matter, on summary judgment because they often present the question of when the plaintiff "reasonably should have known" of facts giving rise to his claim.

lay.") Having pleaded specific facts that showed its claim was time-barred, Trans-Spec was not entitled to resist dismissal on the ground that it was *possible to imagine* circumstances under which the facially time-barred claim might be viable. A court deciding a Rule 12(b)(6) motion is not required to, and indeed may not properly, "assume that [the plaintiff] can prove facts that it has not alleged." *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526 (1983). If the possibility of *imagining* facts that might save a facially-dismissible claim were enough, Rule 12(b)(6) would effectively be a nullity; if the facts are there, they have to be *alleged*.

Trans-Spec next claims, Petition at 14, that it was unfairly surprised by the magistrate-judge's characterization of the warranty it appended to its second amended complaint as a "repair or replace" warranty rather than an "express warranty" and consequently had no opportunity to address that characterization. A "repair or replace" warranty, however, *is* an express warranty when, as here, it is explicitly set forth in a document rather than implied by law. The express warranty Trans-Spec attached as Exhibit C to its second amended complaint and identified as the one allegedly breached by Caterpillar was, on its face, that type of express warranty if it was (as averred by Trans-Spec and accepted by Caterpillar and the magistrate-judge) a warranty at all.[8] All the

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[8] The court of appeals recognized that Exhibit C to the second amended complaint might well have been more accurately characterized as a service contract than an express warranty subject to the Uniform Commercial Code; but because Trans-Spec characterized it as an express UCC warranty in its second amended complaint and did not argue in the district court or on appeal that it was a service contract, any such argument was deemed waived. Petition at 18a-19a. Trans-Spec has now favored this Court with an ostensible explanation for

magistrate-judge did was read Trans-Spec's pleading, including Exhibit C, and correctly apply state law to it. If Trans-Spec, unlike Caterpillar and the magistrate-judge, really failed to recognize Exhibit C for what it was, it can only have been because Trans-Spec did not read its own exhibit, or because it did not read the relevant statutory and decisional law, or both. Nothing Caterpillar or the magistrate-judge said or did had any tendency to mislead Trans-Spec and any surprise that may have resulted from Trans-Spec's neglect to read its own filings or to consult the applicable law is not the kind of surprise that warrants judicial relief.

Finally, Trans-Spec complains bitterly of the magistrate-judge's, the district court judge's, and the court of appeals' refusals to consider the voluminous extrinsic materials it tried to use in opposition to the motion to dismiss. Trans-Spec has in this regard again failed to give a materially accurate account of proceedings below. Trans-Spec neglects to mention that the court of appeals found Trans-Spec had waived this issue on appeal because it failed to raise it in its principal appellate brief and "misrepresent[ed] the state of the record" with respect to it. Petition at 10a-11a and 20a-21a. Trans-Spec has not suggested there was any error in that finding of waiver and there was none. An appellant's failure to raise an issue in its principal brief, even if merely careless, is in and of itself adequate grounds for holding the issue waived. *E.g.*, *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509, 513 (D.C. Cir.), *cert.*

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why it did not aver or argue that Exhibit C was a service contract. Petition at 25 n.8. True or not, as no such explanation or argument was provided either in the district court or in the court of appeals, and is therefore not part of the record, it is not properly before this Court.

denied, 488 U.S. 890 (1988); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 67 n.8 (2nd Cir. 2002); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 n.2 (3rd Cir.), *cert. denied*, 533 U.S. 953 (2001); *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1152 (4th Cir. 1996), *cert. denied*, 522 U.S. 1044 (1998); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982); *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 783 (10th Cir. 2006); *KMS Restaurant Corp. v. Wendy's International, Inc.*, 361 F.3d 1321, 1328 n.4 (11th Cir. 2004). Against the procedural background of this case, the court of appeals could well conclude that Trans-Spec's failure to raise the issue in its principal brief was, like other ultimately unsuccessful ploys in which Trans-Spec engaged, not the result of mere carelessness but an intentional effort to obtain unfair procedural advantage. *Compare* Petition at 11a-13a. The district court's discretionary refusal to consider extrinsic materials submitted in opposition to the motion to dismiss is therefore not an issue that is properly before this Court.

In any event, Trans-Spec identifies no mistake of law by either the district court or the court of appeals with respect to the issue and identifies no inconsistency between what the court of appeals did in this case and what other courts of appeals typically do. Both the district court, Petition at 74a to 75a, and the court of appeals, Petition at 10a and 12a, understood that the district court had discretion to consider extrinsic materials if it chose to do so. Understanding that, the district court exercised its discretion *not* to accept the proffered 53 pages of heterogeneous material, much of it of unclear admissibility or relevance and some of it consisting of items that could reasonably have been found to

have been withheld by Trans-Spec until then for perceived self-serving purposes rather than for any objectively good reason. There was no abuse of discretion in that decision.

II. **Federal law is clear, unanimous, and well-settled that, after the deadline for amendments to the pleadings established by a Fed. R. Civ. P. 16(b) scheduling order has expired, a plaintiff wishing to amend its complaint must first show good cause for revising the scheduling order, including a showing that the proposed amendment could not with reasonable diligence have been made before the deadline was reached. The cases Trans-Spec cites for the contrary position were either decided before the governing language of Rule 16(b) was enacted in 1983 or did not involve cases in which the Rule 16(b) deadline had expired. There was no abuse of discretion in denying Trans-Spec's late motion to amend because Trans-Spec showed no good cause for its untimeliness.**

The courts of appeals for all except the Tenth and District of Columbia Circuits have addressed the subject of what standard must be met by a party seeking to amend its pleading after the Rule 16(b) deadline for amendments has passed. Every one of them has held, as the courts below did in this action, that once the Rule 16(b) deadline for amendments has passed a party may not amend its pleading without first establishing good cause for relief from the Rule 16(b) order, and that good cause for purposes of that rule means a showing that the proposed amendment could not with reasonable diligence have been made before the deadline expired. *See, e.g.*,

O'Connell v. Hyatt Hotels, 357 F.3d 152, 154-155 (1st Cir. 2004); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2nd Cir. 2000); *Eastern Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 340 (3rd Cir. 2000); *Montgomery v. Anne Arundel County, Maryland*, 182 Fed. Appx. 156, 162, 2006 WL 1194308 at *5 (4th Cir. 2006) (unpublished); *Vercon Const. Inc. v. Highland Mortg. Co.*, 187 Fed. Appx. 264, 265, 2006 WL 1747115 at *1 (4th Cir. 2006) (unpublished); *S&W Enters. v. South Trust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003); *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003); *Trustmark Ins. Co. v. General & Cologne Life Re of America*, 424 F.3d 542, 553 (7th Cir. 2005); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715-717 (8th Cir. 2008); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608-609 (9th Cir. 1992); *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1231-1232 (11th Cir. 2008); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998). The court of appeals for the Tenth Circuit has adopted the same rule where late amendment to add counterclaims is concerned, *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518-1519 (10th Cir. 1990), but has not had occasion to address the issue in the context of proposed amendments to the complaint. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205 n.4 (10th Cir. 2006). *But see Miller v. Bd. of Educ. of Albuquerque Public Schools*, 455 F. Supp. 2d 1286, 1304 (D. N.M. 2006) (holding that the Rule 16(b) good cause standard must be met in the context of late amendments to the complaint); *Rowen v. New Mexico*, 210 F.R.D. 250, 252-253 (D. N.M. 2002) (same)[9].

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[9] Caterpillar's counsel has found no authority on the subject either at the court of appeals or the district court level in the District of Columbia.

So it may fairly be said that the court of appeals decision in this action is not "in conflict with the decision of another United States court of appeals on the same important matter ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). It was correct to hold that Trans-Spec, if it wished to amend its complaint for a third time after expiration of the scheduling order deadline for doing so, was first required to demonstrate to the district court that it could not through reasonable diligence have offered the same amendment before that deadline expired.

So far as the hypothetically narrower question of what standard governs when a plaintiff who has failed to meet the Rule 16(b) scheduling order deadline for amendments to the pleadings also waits until after its complaint has been dismissed to seek the untimely amendment, there is likewise unanimity among the courts that have addressed it: the standard is the same Rule 16(b) "good cause" standard. *See, e.g., Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 244 (2nd Cir. 2007); *Love v. Ford Motor Co.*, 212 Fed. Appx. 292, 295, 2006 WL 3826991 at *2 (5th Cir. 2006) (unpublished); *Shane v. Bunzl Distribution USA, Inc.*, 275 Fed. Appx. 535, 536-537, 2008 WL 1896589 at *1-*2 (6th Cir. 2008) (unpublished); *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir. 2002); *In re Milk Products Antitrust Lit.*, 195 F.3d 430, 437-438 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000); *Buel v. City and County of San Francisco*, 166 Fed. Appx. 901, 902-903, 2006 WL 26195 at *1 (9th Cir. 2006) (unpublished); *Baylor Univ. Medical Center v. Epoch Group, L.C.*, 2005 WL 2124126 at *7-*9 (N.D. Tex. 2005); *Dorsey v.*

Northern Life Ins. Co., 2005 WL 2036738 at *21 (E.D. La. 2005); *Tufaro v. Board of Comm'rs. for Orleans Levee Dist.*, 2003 WL 22290290 at *2 (E.D. La. 2003); *Gwyn v. Loon Mountain Corp.*, 2002 WL 1012929 at *8 (D. N.H. 2002), *aff'd.*, 350 F.3d 212 (1st Cir. 2003). Again, the decisions below in this action were consistent with, not in conflict with, the decisions on the same subject by other federal courts and consistent with the ordinary course of proceedings under the rules of civil procedure. Supreme Court Rule 10(a). They were also consistent with common sense and with the general purpose of the rules of civil procedure, *see* Fed. R. Civ. P. 1, to encourage reasonably efficient and expeditious handling of cases. If the law for some reason provided that a motion to amend brought *after* dismissal of a complaint is subject to a materially more relaxed standard than one brought *before* dismissal, dilatory plaintiffs who miss the scheduling order deadline would have an incentive to delay their motions still further, counting on an eventual order of dismissal to ease the path to a late amendment. The rules of civil procedure do not countenance any such absurdity.

In an effort to fabricate a difference of opinion among federal decisions with respect to the standard applicable to late motions to amend, Trans-Spec cites in its Petition, as it did below, decisions from this Court and others that were rendered before the 1983 amendments to Rule 16 that inserted the present requirements that the district court convene a scheduling conference, issue a scheduling order with a deadline for amendments to the pleadings, and providing that the scheduling order may only be revised upon a showing of good cause. But those decisions are simply irrelevant. The 1983 amendments to Rule 16(b) (and to other rules as well) changed the procedural

law governing civil actions in the federal courts. Trans-Spec cites no authority, because there is none, to support the proposition that the provisions inserted into Rule 16(b) in 1983 are invalid or do not mean what they say. *Foman v. Davis*, 371 U.S. 178 (1962), undoubtedly remains good law so far as the correct interpretation of Rule 15(a)(2) is concerned and is appropriate authority to cite when a motion to amend is brought consistent with the scheduling order deadline for amendments; but *Foman* was decided about twenty-one years before the now-controlling provisions of Rule 16(b) were enacted, and says nothing about the interaction between Rule 15 and those provisions. Neither *Foman* nor any of the other pre-1983 cases Trans-Spec cites is evidence of disagreement on the subject of the standards governing *post-1983* motions to amend, and none of those cases has anything at all to say regarding the correctness or incorrectness of the decisions below in this post-1983 action.

As it did below, Trans-Spec has also cited some post-1983 decisions in which courts applied the liberal Rule 15(a) standard in granting post-dismissal motions to amend. *See Buckey v. County of Los Angeles,* 968 F.2d 791 (9th Cir. 1992); *Cortec Industries, Inc. v. Sum Holding, L.P.*, 949 F.2d 42 (2nd Cir. 1992); *Oliver Schools v. Foley*, 930 F.2d 248 (2nd Cir. 1991); *Williams v. Astra USA, Inc.*, 68 F.Supp.2d 29 (D. Mass. 1999). Just as it did below, however, Trans-Spec fails to mention that it does not appear from any of those opinions that a Rule 16(b) deadline for motions to amend had expired or, indeed, even that such a deadline had been established. They are therefore irrelevant. No issue is presented by this Petition regarding the proper standard for granting a motion to amend brought within the time permitted for such motions by the

Rule 16(b) scheduling order; the "issue" – really, a non-issue in light of the plain language of the rule itself and the unanimous authority at the court of appeals level – is what standard to apply when the motion is brought too late.

Trans-Spec also argues the district court erred in finding it had not shown good cause for relief from the deadline for amendments to the pleadings. *But see* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.") Its first argument on this subject, Petition at 21, is implicitly predicated on the same misrepresentation of the record identified *supra* at 9-10. Trans-Spec says:

> How could Trans-Spec have filed a Motion to Amend to cure purported deficiencies raised in Caterpillar's Motion to Dismiss *before* Caterpillar served the Motion to Dismiss? If this is not "good cause," what is?

But the deficiencies in the second amended complaint were not first raised by the motion to dismiss; they were raised by the statute of limitation defense inserted in Caterpillar's answer to the first amended complaint in September, 2004, six months before the deadline for amendments to the pleadings. The answer to Trans-Spec's rhetorical questions is that Trans-Spec's lawyers could have read Caterpillar's affirmative defenses when they received them, reread their complaint in light of the statute of limitations defense contained among those affirmative defenses, given a little thought to the law that governed Trans-Spec's claim, and then – sometime during the six months that intervened between Caterpillar's answer and the scheduling order deadline

for amendments to the pleadings - requested leave to amend to insert factual averments to cure the facial inadequacies of their complaint if they could do so conformably with the provisions of Fed. R. Civ. P. 11.

Trans-Spec's next argument, Petition at 22, seems to be that there was no "undue delay" in its untimely motion to amend because it had no reason to think an amendment was needed until the magistrate-judge recommended allowance of the motion to dismiss. This is just a repackaging Trans-Spec's meritless argument that amendment must routinely be allowed whenever a complaint is dismissed, regardless of the Rule 16(b) deadline and regardless of when the plaintiff knew or should have known the supposed facts which it wishes to insert into its complaint by way of the amendment. That is not the law. A plaintiff is not free to select the particular litigation strategy its lawyers believe best suits its tactical interests but, when their judgment is proved wrong, simply switch to Plan B regardless of what the subsisting schedule for the case says. Trans-Spec had all the information on which its untimely amendment would have been based long before the deadline for amendments to the pleadings; and Trans-Spec certainly knew or should have known what Massachusetts law had to say about the statute of limitations. Whatever Trans-Spec's reasons were for proceeding the way it did, as to which *see* Petition at 12a n.3, they did not include justifiable ignorance of matters that it later decided it wanted to insert into its complaint. [10]

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[10] Trans-Spec also complains that it was subjected to a "double standard" because, after it filed its second amended complaint, Caterpillar's prompt motion to dismiss it pursuant to Rule 12(b)(6) was entertained by the district court even though the scheduling order deadline for such motions had ex-

Trans-Spec seems to labor under a fundamental misunderstanding of what Rule 15 is intended to accomplish. The purpose of Rule 15 is not to give litigants the opportunity to experiment with strategic approaches to the litigation until they find the one that works out best for them. It is not intended to permit litigants to aver one set of facts and then, when those facts turn out not to be so good for them, to aver a new set, and so on until they eventually find, no matter how long it takes, a set of averments that works for them. Rule 15 is intended to prevent injustice, not to facilitate disingenuous pleading and not to excuse litigants or their lawyers from paying attention to the evidence they have or the applicable law.

CONCLUSION

Trans-Spec's Petition identifies no novel issue of federal law or any issue of federal law as to which there is a difference of opinion among the federal courts. It identifies no error of procedural law in the district court or the court of appeals and there was none. Trans-Spec is unhappy with some discretionary decisions the district court made, unhappy with the consequences under state law of the alleged facts that were properly before the district court, and unhappy with the result of the strategy it chose to pur-

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pired. Caterpillar could not move to dismiss the second amended complaint (itself untimely under the scheduling order) until the second amended complaint had been filed. The district court certainly could, and obviously did, properly find that being served with an amended complaint after the deadlines *for amending the complaint* and for Rule 12(b)(6) motions had passed constituted good cause for entertaining a motion to dismiss the belatedly-amended complaint filed promptly after that pleading was filed.

sue in the district court. Unhappiness of that kind is no ground for this Court to grant certiorari review of a run-of-the-mill state law warranty and negligence case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 2004-CV-11836-RCL

TRANS-SPEC TRUCK SERVICE, INC.
d/b/a TRUCK SERVICE,
Plaintiff

v.

CATERPILLAR INC.,
Defendant

CIVIL DOCKET FOR CASE #: 1:04-cv-11836-RCL

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10/27/2004 Electronic Clerk's Notes for proceedings held before Judge Reginald C. Lindsay: Scheduling Conference held on 10/27/04. Fact discovery due by 6/29/05. Plaintiff's expert disclosure due 7/27/05. Defendant's expert disclosure due 8/24/05. Rule 12, 15, 19 and 20 Motions due 3/23/05. Discovery due by 10.26.2005. Motions due by 11/22/05. Court allows Plaintiff to take 12 depositions. (Court reporter none present.) (Stanhope, Don.) (Entered: 10/28/2004).

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06/01/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting 48 Mo-

tion to Amend Scheduling Order (Hourihan, Lisa) (Entered: 06/01/2005).

06/01/2005 Set/Reset Scheduling Order Deadlines: Fact discovery due by 8/29/05. Plaintiff to disclose expert by 9/27/05. Defendant to disclose expert by 10/24/05. Discovery due by 12/23/05. Motions due by 1/27/2006. (Hourihan, Lisa) (Entered: 06/01/2005)

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08/16/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting 68 Motion to Amend Scheduling Order (Hourihan, Lisa) (Entered: 08/16/2005)

08/16/2005 Set/Reset Scheduling Order Deadlines: Fact discovery due by 9/29/05. Plaintiff to disclose expert by 10/27/05. Defendant to disclose expert by 11/23/05. Discovery due by 1/23/2006. Motions due by 2/27/2006. (Hourihan, Lisa) (Entered: 08/16/2005)

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10/26/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting in part and denying in part 76 Assented to MOTION to Amend Scheduling Order. The motion is granted to the extent that it seeks a change in the scheduling order. However, the scheduling order will be changed only to this extent: the deadline for expert reports from the plaintiff shall be December 7, 2005; the deadline for expert reports from the defendant shall be

January 13, 2005; expert discovery shall be concluded by February 17, 2006; dispositive motions shall be filed not later than March 17, 2006. The modification granted today is the third of such modifications in this case. The court will grant no further requests for amendments to the scheduling order. (Lindsay, Reginald) (Entered: 10/26/05)

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02/23/2006 Judge Reginald C. Lindsay: Electronic ORDER entered. ORDER ADOPTING REPORT AND RECOMMENDATIONS for 56 MOTION of Caterpillar Inc. to Strike Portions of Plaintiff's Opposition to Motion to Dismiss and to Strike Certain Attachments and 53 MOTION of Caterpillar Inc. to Dismiss Second Amended Complaint Action on motion: The motion to dismiss counts I and II of the second amended complaint is granted. Because neither the magistrate judge nor I have relied on the documents attached to the plaintiff's opposition, the motion to strike those documents and the portion of the opposition referring to them is moot. (Lindsay, Reginald) (Entered: 02/23/2006)

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01/02/2007 Judge Reginald C. Lindsay: Electronic ORDER entered overruling plaintiff's objection (docket #136) to memorandum and order of magistrate judge (docket #135) and affirming order of magistrate judge in all respects. (Lindsay, Reginald) (Entered 01/02/2007)